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No. 80-1663

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, LOCAL 799, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO and T. W. GLEASON, Individually and as he is President of International Longshoremen's Association, AFL-CIO and H. R. HASSELGREN, Individually and as he is Secretary-Treasurer of International Longshoremen's Association, AFL-CIO and N. J. BOWERS, Individually and as he is Executive Vice President of International Longshoremen's Association, AFL-CIO and F. R. FIELD, JR., Individually and as he is General Organizer of International Longshoremen's Association, AFL-CIO and A. SCOTTO, Individually and as he is Regional Director of International Longshoremen's Association, AFL-CIO and J. T. MOOCK, Individually and as he is First Vice President of International Longshoremen's Association, AFL-CIO and R. A. MASSEY, Individually and as he is Second Vice President of International Longshoremen's Association, AFL-CIO and G. W. DIXON, Individually and as he is Third Vice President of International Longshoremen's Association, AFL-CIO and W. P. LYNCH, Individually and as he is Fourth Vice President of International Longshoremen's Association, AFL-CIO,

Petitioners,

v.

ALLIED INTERNATIONAL, INC.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF AMICUS CURIAE OF THE AMERICAN FARM BUREAU FEDERATION IN SUPPORT OF RESPONDENT

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AUTHORITIES CITED—Continued

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On Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF AMICUS CURIAE OF THE AMERICAN FARM BUREAU FEDERATION IN SUPPORT OF RESPONDENT

The American Farm Bureau Federation, with the written consents of all parties,[1] respectfully submits this brief as Amicus Curiae in support of the Respondent.

INTEREST OF THE AMICUS CURIAE

The American Farm Bureau Federation is a voluntary general farm organization organized in 1919 under the "General Not For Profit Corporation Act" of the State of Illinois. The purpose of the American Farm Bureau Federation is the promotion, protection and representation of the business, economic, social and educational interests of the farmers and ranchers of the United States. It has member State Farm Bureau organizations in 48 states and in Puerto Rico, representing more than 3 million member families.

[1] Their consents have been filed with the Clerk of the Court.

The American Farm Bureau Federation is vitally concerned with the propensity of the International Longshoremen's Association leadership to order secondary boycotts to exert leverage in support of political or other goals unrelated to any primary labor dispute. Such leverage is substantial: each of the grain ships affected by such boycotts carries a multimillion dollar cargo, and the ILA's refusal to load that cargo leads to disrupted business arrangements and financial losses not only for the shipping and stevedoring companies but for the grain elevators, the rail and truck transporters, and the farmers themselves.[2]

In 1975, as in 1980, the American Farm Bureau Federation, along with the Kansas Farm Bureau and the Texas Farm Bureau, filed charges with the National Labor Relations Board's Regional Office in Houston alleging that the International Longshoremen's Association, the ILA's South Atlantic & Gulf Coast District, and ILA Locals 872 and 1273 had violated Section 8(b)(4) of the National Labor Relations Act by engaging in a boycott of grain bound for the Soviet Union.[3]

Today, as in 1975, the American Farm Bureau Federation seeks to protect the economic interests of this nation's farmers from the ILA's inclination to use farm products as a pawn in the Union's machinations. Given

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[2] "The ILA refusal to work . . . has affected the farmers who produce the grain, the transportation companies who move it to ports, and the stevedores who load it aboard vessels." *Baldovin v. International Longshoremen's Association, AFL-CIO*, 626 F.2d 445, 448 (5th Cir. 1980).

[3] Pursuant to the parties' Settlement Stipulation (drafted by the Board's General Counsel), the Board on June 22, 1976, issued a Decision and Order [DS-857, unreported] requiring that the ILA and the other respondents abandon their boycott. *See Baldovin v. International Longshoremen's Association, AFL-CIO, supra*, 626 F.2d at 448, n. 2, which inaccurately asserts that the settlement was concluded "before the case reached the Board." The American Farm Bureau Federation, the Kansas Farm Bureau, and the Texas Farm Bureau were also the charging parties in the unfair labor practice proceedings related to *Baldovin*, 626 F.2d at 448.

the Union's established predeliction for instituting secondary boycotts as a means of expressing its political positions,[4] the American Farm Bureau Federation is concerned that the ILA will continue to call boycotts for those purposes unless this Court makes it clear that such conduct is forbidden by the National Labor Relations Act.

STATEMENT OF THE CASE

At a press conference in New York on January 9, 1980, ILA President Thomas W. Gleason issued a statement ordering ILA members to suspend handling cargo bound to or from Russia.[5] Gleason "estimated that the boycott would affect hundreds of millions of dollars in direct shipments between the United States and the Soviet Union and in Soviet cargo shipped through foreign ports."[6] Furthermore, "[i]n making Soviet goods 'hot cargo,' Gleason maintained that he did not want to 'embarass or second guess' [President] Carter and said that he would respect any requests that might come from the president."[7] When he met with President Carter

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[4] *See* ILA's Petition For A Writ of Certiorari (ILA cert. pet.) at 12-13; ILA's Brief For Respondents-Appellees-Appellants to the Fifth Circuit in *Baldovin v. I.L.A.*, *supra* (ILA Brief to Fifth Circuit) at 26-27. And *see Local 1355, International Longshoremen's Association (Ocean Shipping Service, Ltd.)*, 146 NLRB 723, *enforcement denied*, 332 F.2d 992 (4th Cir. 1964) (ILA's boycott of ships used in trade with Cuba).

[5] The text of Gleason's statement appears in *Allied International, Inc. v. International Longshoremen's Association, AFL-CIO*, 640 F.2d 1368, 1369 n. 2 (1st Cir. 1981).

[6] Inman, *Dockworkers To Boycott Ships, Cargo for Russia*, Houston Post, Oct. 10, 1980, at 27, Col. 3.

[7] *Id.* at Col. 2. And *see ILA Refuses To Work Russian Ships, Move Russian Cargo*, 6 Daily Lab. Rep. A-6-A-7, Jan. 7, 1980. On January 7, 1980, President Carter, responding to the Soviet invasion of Afghanistan, had announced that no agricultural product may be exported to the Soviet Union except under validated export licenses issued to cover unshipped grain committed under the 1975 agreement between the United States and the Soviet Union. *See* "Weekly Compilation of Presidential Documents," Vol. 16, No. 2, Mon., Jan. 14, 1980, pp. 25-27, 32-33.

eight days later, however, and "was told that his union's actions are 'clogging the pipeline and interfering with commerce' and are 'unfair to farmers who need to move their grain,' "[8] Gleason failed to call the boycott off.

As Gleason's directive required, the boycott was implemented in all Atlantic and Gulf Coast ports wherever ILA longshoremen handle cargo, forcing a variety of American companies, completely "neutral" to the ILA's "dispute" with the Soviet Union, to cease doing business with each other vis-a-vis cargo bound to or from Russia. Allied International, Inc., an importer of wood products from the Soviet Union, filed the complaint in the instant case, alleging, *inter alia*, that the ILA's actions violated Section 8(b)(4) of the National Labor Relations Act,[9] and that Allied was thus entitled to damages under Section 303 of the Act.[10]

As fully set forth in its decision,[11] the United States Court of Appeals for the First Circuit reversed the district court's dismissal of Allied's NLRA claims,[12] and held that: (1) the Supreme Court's "foreign flag" decisions,[13] which deny NLRA jurisdiction in situations in-

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[8] *Carter Urges ILA To Send Remaining Grain To Soviets*, 13 Daily Lab. Rep. A-8, Jan. 10, 1980.

[9] The text of Section 8(b)(4)(i) and (ii)(B) appears in Appendix A.

[10] The text of Section 303 appears in Appendix B.

[11] *Allied International, Inc. v. International Longshoremen's Association, AFL-CIO*, 640 F.2d 1368 (1st Cir. 1981).

[12] *Allied International, Inc. v. International Longshoremen's Association*, 492 F.Supp. 334 (D. Mass. 1980), relying on *Walsh v. International Longshoremen's Association*, 488 F.Supp. 524 (D. Mass. 1980).

[13] *Benz v. Compania Naviera Hidalgo, S.A.*, 353 U.S. 138 (1957); *McCulloch v. Sociedad Nacional, etc.*, 372 U.S. 10 (1963); *Incres S.S. Co. v. International Maritime Workers Union*, 372 U.S. 24 (1963); *International Longshoremen's Local 1416, AFL-CIO v. Ariadne Shipping Company*, 397 U.S. 195 (1970); *Windward Shipping (London) Ltd. v. American Radio Association, AFL-CIO*, 415 U.S. 104 (1974); *American Radio Association, AFL-CIO v. Mobile Steamship Association, Inc.*, 419 U.S. 215 (1974).

volving American labor unions' labor disputes or labor objectives concerning foreign crews of foreign ships, are inapplicable to the instant case since "[t]here is no question of interference in the affairs of a foreign employer;" [14] (2) "the ILA leadership directed ILA members . . . to engage in a concerted refusal to handle a certain class of goods . . .";[15] (3) "the object of a boycott, for purposes of section 8(b)(4)(ii)(B), can be inferred from the virtually inevitable results generated by it, at least when, as here, the union's conduct can under no reading of the facts be characterized as 'primary activity' protected by the Act";[16] (4) "when a union orders all employees of a neutral employer to cease handling goods originating from a particular source, it is *a fortiori* forcing that employer to 'cease doing business with' that source";[17] (5) absence of a primary labor dispute does not preclude National Labor Relations Board jurisdiction over a union's secondary boycott conduct;[18] (6) application of Section 8(b)(4) to "national boycotts undertaken as a form of 'political expression'" deprives neither ILA leaders nor members of their statutory or constitutional rights of expression;[19] and (7) the ILA's boycott violates Section 8(b)(4) as alleged.[20]

SUMMARY OF ARGUMENT

In its "foreign flag" decisions,[21] this Court has established the principles that considerations of international

[14] *Allied International, supra*, 640 F.2d at 1371-74.

[15] *Id.* at 1374.

[16] *Id.* at 1375-76. And *see id.* at 1377 ("we think it plain that the ILA was not engaged in primary activity and that the boycott . . . was 'calculated to satisfy union objectives elsewhere.'"). *Compare Walsh v. I.L.A., supra*, 488 F.Supp. at 531 ("this a primary boycott of Russian goods, with incidental effects upon those employers who deal in such goods.").

[17] 640 F.2d at 1377-78.

[18] *Id.* at 1377-78. And *see* fn. 70 below.

[19] *Id.* at 1378-79.

[20] *Id.* at 1379.

[21] *See* fn. 13, *supra*.

comity preclude intrusion of National Labor Relations Act jurisdiction into international maritime labor disputes, and therefore, that the NLRB may not assert jurisdiction over either a union's primary labor dispute concerning the foreign crew members of a foreign-owned ship [*Windward, supra*, 415 U.S. at 115] or the secondary effects of such a dispute upon neutral domestic employers. *Mobile, supra*, 419 U.S. at 224-25. The Court has emphasized, however, that where foreign shipboard labor relations are not at issue, "the Board has jurisdiction under § 8(b)(4) of domestic secondary activities which are in commerce, even though the primary employer is located outside the United States." *Id.* at 225, n. 10.

Since the instant case involves no primary employer and no primary labor dispute, but only secondary boycott activity in furtherance of the ILA's "dispute" with the Soviet Union, this Court's "foreign flag" concerns regarding interference with international martime labor relations are not germane to the jurisdictional issue here. Furthermore, as the NLRB and most courts have held, the absence of a primary labor dispute does not deprive the Board of jurisdiction over a union's secondary boycott.[22] Accordingly, there is no barrier to the assertion of Section 8(b)(4) jurisdiction in this case.

The ILA's conduct, including Thomas W. Gleason's order instituting the boycott and the refusal of the ILA locals to refer longshoremen to handle cargo bound to or from Russia, induced ILA members to engage in a concerted refusal to handle such cargo and thus coerced or restrained a variety of neutral employers. And since it was reasonably foreseeable that the boycott would force neutral employers to cease doing business vis-a-vis Soviet cargo, an unlawful object of forcing such a cessation of business may be inferred. *N.L.R.B. v. Retail Store Employees Union, Local 1001*, 447 U.S. 607 (1980).

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[22] *See International Longshoremen's Association, AFL-CIO (Allied International, Inc)*, 257 NLRB No. 151 (1981), slip op. at 11-13, and cases cited therein.

Finally, contrary to the ILA's claims, the boycott is not protected by the First Amendment. *International Brotherhood of Electrical Workers, Local 501 v. N.L.R.B.*, 341 U.S. 694 (1951).

In sum, the court below correctly held that the ILA has violated Section 8(b)(4)(B) by instituting and maintaining a secondary boycott of cargo bound to or from Russia.

ARGUMENT

I. This Court's "Foreign Flag" Decisions Do Not Preclude National Labor Relations Act Jurisdiction Over A Union's Domestic Secondary Boycott Activity When The Union's Conduct Is Not In Furtherance of a Primary Labor Relations Dispute Or Objective Concerning the Foreign Crew Members of Foreign-Owned Vessels.

A. The "Foreign Flag" Cases Are All "Labor Dispute" Cases, and the Court's Withholding of Jurisdiction Has Been Grounded In International Comity Considerations Regarding the Impropriety of Intruding Domestic Labor Act Jurisdiction Into Foreign Maritime Labor Disputes.

As the court below correctly found, this Court's "foreign flag" holdings,[23] which delineate "the threshold of interference with the maritime operations of foreign vessels which makes the [Act] inapplicable,"[24] do not preclude the assertion of NLRA jurisdiction over the ILA's boycott activities in the instant case.[25]

In its "foreign flag" decisions, this Court has held that American unions' labor disputes or labor relations objectives vis-a-vis foreign shipowners and their foreign crews are beyond the jurisdiction of the NLRB because assertion of such jurisdiction would intrude the domestic labor law into the maritime operations of foreign ves-

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[23] *See* n. 13, *supra*.

[24] *Allied International, supra*, 640 F.2d at 1372, quoting *Windward, supra*, 415 U.S. at 114.

[25] *Allied*, 640 F.2d at 1371-74.

sels, contrary to "longstanding principles of comity and accommodation in international trade."[26] Furthermore, where a union's conduct in furtherance of its primary labor objective or dispute with a foreign shipowner is beyond the Act's jurisdiction,[27] the effects of that conduct upon neutral "secondary" employers are also beyond the Act's jurisdiction.[28]

The central focus of all the "foreign flag" cases is some sort of labor dispute. In each case, one or more American unions were attempting to achieve a labor-oriented goal vis-a-vis employees of foreign shipowners.[29] In *Windward* and *Mobile*, as this Court observed, the union's objective was to protest the undermining of area standards by foreign shipowners and, hopefully, to force

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[26] *Windward*, 415 U.S. 112-13. And *see* the Court's summary of its holdings in *Benz*, *McCulloch*, *Incres*, and *Ariadne* at 415 U.S. 109-113.

[27] *Windward*, 415 U.S. at 115.

[28] *Mobile*, 419 U.S. 224-25.

[29] Picketing to support striking foreign employees of foreign shipowners (*Benz*); organizational picketing seeking to represent foreign employees of foreign shipowners (*Incres*); seeking to represent foreign employees of foreign shipowners in a Board-ordered election (*McCulloch*); protesting wages paid by foreign shipowners to U.S. longshoremen servicing foreign ships (*Ariadne*); and picketing to protest foreign shipowner's payment of "substandard" wages to foreign crewmen (*Windward* and *Mobile*). The facts of *Windward/Mobile* show that the union, which was concerned with declining jobs caused by the "competitive advantage enjoyed by [foreign] vessels because of the differences between foreign and domestic seamen's wages" [*Windward*, 415 U.S. at 106-107], essentially was engaging in what is known as "area standards" picketing. *See, e.g., United Brotherhood of Carpenters, Local 1245*, 229 NLRB 236, 240 (1977). In *Windward*, foreign shipowners undermined United States mariners' job opportunities by paying wages below area standards and thus gained a competitive advantage in the shipping market. As the union's picket signs proclaimed, "the wages and benefits paid seamen aboard the vessel . . . are substandard to those of American seamen. This results in extreme damage to our wage standards and loss of our jobs. . . ." *Windward*, 415 U.S. at 107; *Mobile*, 419 U.S. at 217, n. 2.

those shipowners to raise their costs, including wage costs, so as to eliminate the competitive edge they derived from paying low wages to their foreign crews.[30] Furthermore, from the facts of *Incres* and *McCulloch*, it is apparent that the American maritime unions' *first* line of attack had been to organize such foreign crews.[31] Presumably, had they been successful in such organizing efforts, the unions in those cases would have attempted to negotiate wage increases for the foreign crews.

In *Windward*, the Court considered the possibility that foreign shippers might respond to the picketing by taking action, *other than* raising wages, that would affect their maritime operations. But the Court stressed that, of all the possible "predictable responses," wage increases would have the greatest impact on "maritime operations":

> A decision by the foreign owners to raise foreign seamen's wages to a level mollifying the American pickets would have the *most significant and far-reaching effect on the maritime operations* of these ships throughout the world.[32]

The effects of the shippers' other possible responses were described by the Court in far less dramatic terms.[33]

The crucial issue in all of the "foreign flag" cases is whether the union's conduct crosses the "threshold of interference with the maritime operations of foreign vessels which makes the LMRA inapplicable."[34] If the

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[30] *See* n. 29, *supra*.

[31] Thus, National Maritime Union of America, AFL-CIO, filed the representation petition in *McCulloch*, 372 U.S. 10, 13, and International Maritime Workers Union, "an American labor organization formed by two other American unions for the primary purpose of organizing foreign seamen on foreign-flag ships," engaged in the organizational picketing in *Incres*. 372 U.S. at 25-26.

[32] *Windward*, 415 U.S. at 114 (emphasis supplied).

[33] *Windward*, 415 U.S. at 114-115.

[34] *Id.* at 114.

Court in these cases has not treated "maritime operations" as conceptually identical with "labor relations," it clearly has viewed labor relations as the central and most significant aspect of such operations. The majority in *Mobile* emphasized the primacy of the labor relations aspect of maritime operations in its rejection of the dissent's suggestion that the majority's rationale required reversal of *Ariadne* since that case "held that longshoremen servicing 'foreign flag' vessels in American ports are 'in commerce' . . . ." [35] The majority countered by observing that in contrast to the situation in *Ariadne*, where the pickets protested wages paid to fellow American longshoremen, "[h]ere the picketing which triggered the dispute was not directed toward any wages or conditions of employment of the longshoremen. It was instead directed to substandard wages being paid to the crews of 'foreign-flag' vessels throughout those vessels' worldwide maritime operations." [36] In the Court's view, it was *this* "effect," which, of course, bears directly upon employer-employee relations on foreign vessels, that crossed the threshold of interference with maritime operations and rendered the LMRA inapplicable.[37]

The ILA reads this Court's *Windward* and *Mobile* decisions as holding that Section 8(b)(4) jurisdiction is obviated whenever a union's domestic secondary boycott is in furtherance of any kind of "dispute" with *any* kind of foreign "entity." [38] The ILA's interpretation thus assumes that a primary labor dispute or labor relations objective is irrelevant to the Court's *Windward-Mobile*

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[35] *Mobile*, 419 U.S. at 223, fn. 9.

[36] *Id.*

[37] *Id.*

[38] *See* ILA cert. petition at 6-8. The only kind of dispute between an "American union and a foreign entity" which the ILA concedes to be jurisdictional is that in *Ariadne*—a "dispute over the hiring in United States ports of unionized American labor." *Id.* at 6, n. 3. And *see* ILA's "Brief For Petitioners" ("ILA Brief" or "Brief") at 5, 10, 19-21).

rationale, and, therefore, that the principles developed by this Court in *Benz* through *Ariadne*[39] are irrelevant as well. If the ILA were correct, the pre-*Windward* cases could have been decided simply on the issue of whether the union had a dispute with a foreign "entity" whose "predictable responses" would not beneficially effect American workingmen's wages,[40] regardless of whether assertion of Board jurisdiction would raise conflicts with foreign labor laws[41] or would require inquiry into labor disputes between foreign shipowners and their foreign crews.[42]

But the language of the *Windward/Mobile* decisions simply does not support the notion that the Court was

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[39] *See* the discussion above, pp. 7-10.

[40] ILA Brief at 9.

[41] *McCulloch*, 372 U.S. at 20-22.

[42] *Benz*, 353 U.S. at 143. The ILA's analysis also ignores this Court's statement in *Mobile* that its holding there "cast no doubt" upon *Madden v. Grain Elevator, Flour and Feed Mill Workers, International Longshoremen Assn., Local 418*, 334 F.2d 1014 (7th Cir. 1964), *cert. denied* 379 U.S. 967 (1965), and *Grain Elevator, Flour and Feed Mill Workers, International Longshoremen Assn., Local 418, AFL-CIO v. N.L.R.B.*, 376 F.2d 774 (D.C. Cir.), *cert. denied*, 389 U.S. 932 (1967), which recognized "that the Board has jurisdiction under § 8(b)(4) of domestic secondary activities which are in commerce, even though the primary employer is located outside the United States." 419 U.S. at 225, n. 10. That the Court's specific preservation of Board jurisdiction in cases like *Madden* and *Grain Elevator Workers* rests upon the factual differences between those cases and *Windward/Mobile* demonstrates that the Court's rationale for denying jurisdiction over the "domestic secondary activities" in *Mobile* is closely tied to the facts of that case. As the majority in *Mobile* put it, where "picketing activities. . . *so directly affect* the maritime operations of foreign vessels," the Board will not have jurisdiction over either the primary picketing or its secondary effects. 419 U.S. at 228 (emphasis supplied). Where the only conduct at issue, however, is "domestic secondary activity which is in commerce" (as in *Madden/Grain Elevator Workers*), it is apparent that the Court does not view such activity as directly affecting maritime operations so as to negate Board jurisdiction.

abandoning or rendering irrelevant the principles enunciated in *Benz* through *Ariadne*. Rather, those principles obviously are the foundation upon which the *Windward/Mobile* rationale is built and play a necessary part in the jurisdictional analysis.[43]

B. Where There Is No Foreign Maritime Labor Dispute, But Only Domestic Secondary Activity, the Court's "Foreign Flag" Concerns Are Irrelevant and the Board Has Jurisdiction Even If the "Primary" Is Located Outside the United States.

The court below perceived the central labor relations focus of this Court's "foreign flag" rulings and viewed *Windward/Mobile* as establishing the principle that:

> [I]n a case involving *intertwined* "primary" and "secondary" *labor* disputes, lack of Board jurisdiction over the primary dispute will preclude Board jurisdiction over the secondary conduct—more particularly where a contrary rule might well suggest an improper interference by the United States in the relationship between foreign employers and laborers.[44]

The court observed that, as in *Madden* and *Grain Elevator Workers*,[45] "application of Section 8(b)(4) here would portend no interference in the management or affairs of foreign companies, workers, or labor organizations. This case is thus far removed from the situation that faced the court in *Mobile*."[46] Because "[t]he *only* labor-related activity in issue has been played out by an all-American cast,"[47] the "foreign flag" principles are inapplicable here.

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[43] For the Board's summary of this Court's "foreign flag" holdings, *see International Longshoremen's Association, AFL-CIO (Allied International, Inc.)*, 257 NLRB No. 151, slip op. at 15.

[44] *Allied International*, 640 F.2d at 1374, n. 4 (emphasis in original). And *see, International Longshoremen's Assn. (Allied International, Inc.)*, 257 NLRB No. 151, slip op. at 18-21, 23.

[45] *See* fn. 42, *supra*.

[46] *Allied*, 640 F.2d at 1374.

[47] *Id.* at 1373.

The court's conclusion that neutral employers in these circumstances are entitled to the Act's protection was endorsed by the NLRB in its decision in the related unfair labor practice case.[48] Moreover, the Board's *Allied* holding is consistent with its 1964 assertion of jurisdiction over an earlier ILA political boycott of vessels used in trade with Cuba, *Local 1355, International Longshoremen's Association (Ocean Shipping Service, Ltd.)*.[49] Rejecting the ILA's contention there that *Incres et al.* precluded NLRB jurisdiction because the vessel at issue was a foreign ship with an alien crew, the Board made it clear that this Court's foreign flag concerns were not applicable.[50]

Although the Fourth Circuit reversed the Board's jurisdictional holding on other grounds, the court agreed with the Board that this Court's "foreign flag" rulings did not foreclose jurisdiction over the ILA's conduct.[51] Similarly, in its *Allied* decision, the Board emphasized that *Ocean Shipping* is "in harmony with the Supreme Courts' rulings in *Windward* and *Mobile*."[52] It is thus apparent that today, as in 1964, the ILA's non-labor "dispute" with a foreign "entity"[53] is irrelevant to the issue of Board jurisdiction over the Union's secondary boycott activities.[54] Holding those activities unlawful

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[48] *See Allied International, supra*, 257 NLRB No. 151, slip op. at 23-24; and *see id.* at 9, nn. 12 & 13; 15; 36.

[49] 146 NLRB 723 (1964), *rev'd. sub nom. N.L.R.B. v. International Longshoremen's Association and Local 1355*, 332 F.2d 922 (4th Cir. 1964).

[50] 146 NLRB at 724, fn. 3.

[51] *N.L.R.B. v. I.L.A., supra*, 332 F.2d at 995.

[52] 257 NLRB No. 151, slip op. at 24. And *see id.* at 35.

[53] *See* fn. 70 below.

[54] The ILA claims [cert. pet. at 9; Brief at 15, n. 13; 16] that assertion of NLRA jurisdiction over its boycott also conflicts with the Board's holding in *National Maritime Union of America (Shippers Stevedoring Company)*, 245 NLRB 149 (1979). The Board, however, rejected this contention in its *Allied* decision, indicating

would *not* "resolve labor disputes between nationals of other countries operating ships under foreign

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that *Shippers*, unlike the instant case, falls within the *Windward/Mobile* limitation on jurisdiction because the union there sought to compel "the total replacement of the foreign ship and its foreign crew with an American ship and its American crew. . . . [T]he dispute *directly* intruded into the maritime operations of a foreign ship." [257 NLRB No. 151, slip op. at 22, n. 29, emphasis in original.]

While the amicus agrees with the Board that *Shippers* is not controlling here, it disagrees with the Board's analysis of that case and maintains that *Shippers* was itself incorrectly decided. As set forth by the NLRB's Administrative Law Judge, the facts of *Shippers* do not raise the kinds of issues that concerned this Court in the "foreign flag" cases. No labor dispute was involved. The union in *Shippers* picketed a Russian vessel, not in order to influence shipboard labor relations of Russia or of any foreign shipper, but rather to protest the alleged failure of the United States Department of Transportation to comply with the "Merchant Marine Act's law of cargo preference" which required that a certain proportion of imported cargo purchased by the United States Government be carried on American ships. The union so stated its purpose, prior to engaging in its picketing, both to the press and to the stevedoring company affected. And the union called off its pickets when it received assurances from the Department of Transportation that the government would comply with the cargo preference requirements. 245 NLRB at 150-52. In spite of these facts, however, the Board in *Shippers* adopted the ALJ's holding that the union's picketing "was not picketing in commerce within the meaning of the LMRA" (*Id.* at 157), apparently because none of the Russian shipowners' "predictable responses" would benefit American seamen represented by the union (*Id.*).

The impropriety of focusing upon a foreign shipowner's "predictable responses" in assessing the jurisdictional issue is demonstrated by the facts of *Shippers*: the responses of Russian shipowners were *irrelevant*, since the union's objectives could be satisfied (and ultimately were satisfied) *only* by the "response" of an agency of the United States Government. Furthermore, the full extent (and object) of the union's effect upon the "operations of foreign ships" was simply what was mandated in the cargo preference law. Therefore, it was *Congress*, presumably taking into account the substantial international ramifications of its conduct, which adversely affected the "foreign maritime operations" at issue in *Shippers*.

laws . . .," [55] raise "the possibilities of international discord . . . and retaliative action . . .," [56] or "exert United States jurisdiction over and apply its laws to the internal management and affairs of [foreign-owned] vessels . . . ." [57] As the ILA well knows, the only entity whose conduct or policies would be significantly affected by such jurisdiction is the ILA itself.

II. The Board Is Not Deprived Of Section 8(b)(4) Jurisdiction Over A Union's Secondary Boycott By The Absence Of A Primary Labor Dispute.

The court below rightly rejected the argument that Section 8(b)(4) requires a dispute with a primary employer as a pre-condition to finding a union's secondary pressures unlawful.[58] As the Board observed in its *Allied* decision:

> Although Section 8(b)(4) is commonly described as prohibiting secondary boycotts, its prohibitions do not encompass a primary-secondary dichotomy. Rather, Section 8(b)(4) prohibits certain specified conduct if engaged in with certain specified objectives. The absence of a primary labor dispute does not preclude the invocation of Section 8(b)(4)'s protections.[59]

Although the Fourth Circuit, overturning the Board's *Ocean Shipping* decision, held that the Board may not exercise Section 8(b)(4) jurisdiction over a boycott that is "political in nature" because the existence of a labor dispute with a primary employer is an "indispensible prerequisite to jurisdiction," [60] the Board itself, and indeed

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[55] *Benz*, 353 U.S. at 143.

[56] *Id.* at 147.

[57] *McCulloch*, 372 U.S. at 20-22.

[58] 640 F.2d at 1377-78. And *see* ILA Brief at 28-29.

[59] 257 NLRB No. 151, slip op. at 11-12, fn. omitted. And *see id.* at 12-13 and cases cited therein.

[60] *N.L.R.B. v. I.L.A., supra*, 332 F.2d at 895-96. The court also found that the ILA's refusal to refer employees was not "coercive" within the meaning of Section 8(b)(4)(ii)(B), and, therefore, that the Board's order must be denied enforcement. *Id.* at 999, 997.

most courts, have rejected the Fourth Circuit's position. In fact, shortly after the Fourth Circuit's decision issued, the Board, in *National Maritime Union of America, AFL-CIO (The Weyerhaeuser Co.)*,[61] specifically refused to follow it.

Furthermore, "[o]f the five circuits that have considered the issue, only the Fourth Circuit found a primary [labor] dispute necessary to the finding of a violation of Sec. 8(b)(4) . . .,"[62] and several courts have criticized the Fourth Circuit's reasoning.[63]

Beyond the relatively straightforward error of assuming that a primary labor dispute is a prerequisite to Section 8(b)(4) jurisdiction, imprecise reasoning concerning the nature and relationship of "primary" and "secondary" conduct can cloud the analysis in equally misleading ways. For example, the pitfalls of assuming, explicitly or implicity, that there must be *some* form of "primary" activity from which secondary conduct may be distinguished are illustrated by the Fourth Circuit's conclusion in *Ocean Shipping*,[64] adopted by the district court in *Walsh*,[65] that political boycotts are protected by

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[61] 147 NLRB 1317-18, n. 3 (1964), *enforced* in *National Maritime Union v. N.L.R.B.*, 342 F.2d 538 (2nd Cir. 1965), *cert. denied*, 382 U.S. 835 (1965).

[62] 257 NLRB No. 151, slip op. at 12, fn. 15.

Contrary to the ILA's contentions, [Brief at 39-40] the Second, Eighth, and D.C. Circuits did *not* "suggest[] that the presence of a *political* dispute would protect" a secondary boycott in furtherance of such a "dispute," but merely noted that political disputes were not before them. The courts' distinctions were not, as ILA urges, "motivated" by "First Amendment considerations." Brief at 40.

[63] *See, e.g., National Maritime Union v. N.L.R.B.*, 346 F.2d 411, 415-16 (D.C. Cir. 1965); *Mountain Navigation Co., Inc. v. Seafarers International Union of North America*, 348 F. Supp. 1298, 1302-03 (W.D. Wis. 1971); and *Harrington & Company, Inc. v. I.L.A.*, 356 F. Supp. 1079, 1082-83 (S.D. Fla. 1973).

[64] 332 F.2d at 997.

[65] 488 F. Supp. at 531.

the primary conduct proviso to Section 8(b)(4)(B).[66] Congress' purpose in enacting that proviso, however, was to preserve "the right of labor organizations to bring pressure to bear on offending employers in *primary labor disputes* . . . ."[67] In the instant case, as in *Ocean Shipping*, there is no primary employer and no labor dispute with a primary employer. Accordingly, the conditions to which the proviso applies simply are not present, and, contrary to the Fourth Circuit in *Ocean Shipping* and the district court in *Walsh*, that proviso is irrelevant to an analysis of the legality of political boycotts.[68]

Similarly, when the ILA states that the First Circuit's holding on the jurisdictional issue "is a classic example of 'bifurcating' the domestic effects and the underlying dispute . . .,"[69] the Union is analogizing its "underlying foreign dispute" to the primary labor dispute at issue in *Mobile* and thus is attempting to camouflage the absence in this case of the very factor that was crucial to this Court's analysis in *Mobile* and the other foreign flag decisions.[70]

In sum, the absence of a primary labor dispute in this case not only is no barrier to the assertion of Section 8(b)(4) jurisdiction over the ILA's domestic sec-

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[66] *See* Appendix A.

[67] II Leg. History of the Labor Management Reporting and Disclosure Act 1036 (1959), quoting *N.L.R.B. v. Denver Bldg. & Constr. Trades Council*, 341 U.S. 675, 692 (emphasis supplied). And *see* II Leg. Hist. at 1325 [remarks of Sen. Morse], 1383-84, 1708, 1720-21, 1810, 1818, 1821, and 1834.

[68] Furthermore, as the court below observed, there are substantial public policy considerations which militate against reading a political boycott exception into the Section 8(b)(4) prohibitions of secondary activity. 640 F.2d at 1378.

[69] ILA cert. pet. at 6. And *see* Brief at 15, 18.

[70] Significantly, the ILA not only has no primary labor dispute or objective *vis-a-vis* a foreign shipowner, it has no "primary dispute" of *any* kind with *any* entity. The "dispute" is between Russia and Afghanistan, and while the ILA may be displeased with Russia's actions in Afghanistan, the union certainly may not be regarded as a party to that dispute.

ondary boycott activities, it renders irrelevant both the primary conduct proviso of Section 8(b)(4)(B) and this Court's foreign flag rulings.

III. The ILA's Statements and Conduct Have Induced Employees to Engage In a Concerted Refusal to Handle Cargo Bound To or From Russia and Have Thus Coerced Neutral Persons Engaged In Commerce.

There can be no doubt that Thomas W. Gleason's January 9, 1980, statement was a "binding order from the president of the ILA to the rank-and-file membership," and that this directive emanating from the ILA leadership "induced and encouraged ILA members . . . to engage in, a refusal to handle . . ." products bound to or from Russia.[71]

This Court has held that "[t]he words 'induce or encourage' are broad enough to include in them every form of influence and persuasion."[72] Picketing or similar conduct is not a necessary element; written or oral statements are sufficient inducement or encouragement. In fact, as the Second Circuit has held, "proof of actual intent [is] unnecessary," and even a union leader's "equivocal" statement of assertedly "personal views" will be held to constitute unlawful inducement if work stoppages actually occur as a result of such statements.[73]

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[71] *I.L.A. (Allied Int'l.), supra*, 257 NLRB No. 151, slip op. at 28-29. And *see Allied Int'l., supra*, 640 F.2d at 1374 ("it is uncontroverted that the ILA leadership directed ILA members . . . to engage in a concerted refusal to handle a certain class of goods. . ."); *International Longshoremen's Association, AFL-CIO (Kansas Farm Bureau)*, NLRB-JD-99-81, slip op. at 5-6. *See* also ILA Brief at 35, n. 47 ("The ILA certainly 'encouraged' its members in the stance they had taken by backing them.")

[72] *International Brotherhood of Electrical Workers, Local 501 v. N.L.R.B.*, 341 U.S. 694, 701-702 (1951). And *see Local 732, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America*, 229 NLRB 392, 400 (1977); *Orange County District Council of Carpenters*, 242 NLRB 587, n. 10 (1979).

[73] *N.L.R.B. v. Local Union No. 3, Int. Bro. of Elec. Wkrs., AFL-CIO*, 477 F.2d 260, 264-65 (2d Cir.), *cert. denied*, 414 U.S. 1065 (1973).

A union cannot shift responsibility for unlawful secondary conduct to the employees it represents. As the District of Columbia Circuit has held, where union policy supports a boycott, a finding of violation would not be "undermined on the ground that the secondary employees had acted individually in deciding to avoid the struck ship." [74] Similarly, the Board has held that where a union is aware of Section 8(b)(4) activities by or on behalf of employees it represents, and fails to "discourage or disclaim those activities," the union will be held "responsible for the activities found illegal." [75]

Union conduct which has a prohibited object or effect will be found unlawful even if the cessation of business relations is not complete.[76] Rather, "if the foreseeable result of secondary activity will be more than a 'slight' disruption of business relations, the 'cease doing business' requirement is met." [77]

Finally, a union engages in prohibited coercion or restraint of neutral persons when, as the ILA has done here, it refuses to refer workers.[78] Thus, contrary to

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[74] *Grain Elevator, Flour and Feed Mill Workers, International Longshoremen's Association, Local 418, AFL-CIO v. N.L.R.B.*, 376 F.2d 774, 776 (D.C. Cir. 1967).

[75] *International Longshoremen's Association, AFL-CIO, etc. (Shipside Packing Company, Inc)*, 227 NLRB 659, n. 1 (1976). But *see N.L.R.B. v. I.L.A. (Ocean Shipping)*, *supra*, 332 F.2d at 997-99 and *Walsh v. I.L.A.*, *supra*, 488 F. Supp. at 530-31, wherein the courts take the view that Section 8(b)(4) is not violated by employees' politically motivated refusals to work vessels or cargo which are subject to an ILA-ordered boycott.

[76] *See, e.g., Local 399, Int'l Brotherhood of Electrical Workers*, 235 NLRB 555, 560 (1978), citing *N.L.R.B. v. Local 825, Int'l Union of Operating Engineers, AFL-CIO* [*Burns and Roe, Inc.*], 400 U.S. 297 (1971).

[77] *N.L.R.B. v. Local 85, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America*, 454 F.2d 875, 878-79 (9th Cir. 1972).

[78] *International Longshoremen's Association, Inc., supra*, 257 NLRB No. 151, slip op. at 36; and *see, International Longshoremen's Association, AFL-CIO (Kansas Farm Bureau)*, NLRB JD-

the ILA's claim that it has engaged in merely a "passive protest," the evidence clearly shows that the union has, within the meaning of the Act, induced or encouraged employees to refuse to handle cargo bound to or from Russia, and has restrained or coerced neutral persons engaged in domestic and foreign commerce.

IV. The ILA's Unlawful Object Of Forcing Neutral Employers To Cease Doing Business May Be Inferred From the Reasonably Foreseeable Consequences of the Union's Secondary Boycott Conduct.

Rejecting the ILA's contention that its "sole object is to vindicate the consciences of its members . . . and, by passive action, to protest politically the invasion of Afghanistan," the court below found that "the ILA has chosen to carry out its goal of protest through action—a selective work stoppage—which by its very nature is designed to force at least partial cessation of business between companies with which ILA has no labor-related grievance." [79] Citing this Court's holding in *N.L.R.B. v. Retail Store Employees Union, Local 1001* [80] that a union is "responsible for the foreseeable consequences of its conduct," [81] the court held that "the object of a boycott, for purposes of section 8(b)(4)(ii)(B), can be inferred from the virtually inevitable results generated by it, at

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99-81 (1981), slip op. at 5. And *see Local Union No. 418, Sheet Metal Workers International Association, AFL-CIO*, 235 NLRB 144, 146 (1978); *Penello v. International Longshoremen's Association*, 227 F. Supp. 164, 169 (D. Md. 1964); *N.L.R.B. v. Local 825, International Union of Operating Engineers, AFL-CIO*, 315 F.2d 695, 697-98 (3rd Cir. 1963). Contrary to the weight of authority, the Fourth Circuit in *Ocean Shipping* held that a union's refusal for "political" reasons to refer workers to selected neutral employers does not constitute retraint or coercion of such employers within the meaning of Section 8(b)(4)(ii)(B). 332 F.2d at 996-99. Other than *Walsh*, however, no subsequent decisions have been found which follow the court's views on this issue.

[79] 640 F.2d at 1375.

[80] 447 U.S. 607, 100 S. Ct. 2372 (1980).

[81] *Id.*, 100 S. Ct. at 2377, n. 9.

least when, as here, the union's conduct can under no reading of the facts be characterized as 'primary activity' protected by the Act." [82]

Like the court below, the Board found that the ILA's conduct "is exclusively secondary. . . . Respondents attempted to pressure the USSR through those parties doing business with it—the very tactic Section 8(b)(4) was enacted to prohibit." [83] And the Board agreed that the ILA's unlawful intent may be inferred from the foreseeable consequences of the union's conduct.[84]

Contrary to ILA's contention that the First Circuit's holding constitutes an "unwarranted and dangerous . . . extension of the holding in *Retail Store Employees*," [85] the court's reasoning is fully consonant with that of a long line of Board and court decisions to the effect that "[I]n the absence of admissions by the union of an illegal intent, the nature of the acts performed shows the intent." [86] In fact, the ILA has been "on notice" since 1964 that the Board would draw such an inference, for

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[82] 640 F.2d at 1375-76 (citations and footnote omitted).

[83] *International Longshoremen's Association (Allied Int'l.)*, *supra*, 257 NLRB No. 151, slip op. at 34, fn. omitted.

[84] *Id.* at 30, 33.

[85] ILA cert. petition at 12. In contrast to the position espoused in its petition for certiorari, the ILA in its Brief to the Fifth Circuit in *Baldovin* admitted that if its boycott does not fall within the protections of the First Amendment, it violates the National Labor Relation Act's prohibition on secondary boycotts: "In the instant case, there is an either/or situation. Either respondents' actions violate § 8(b)(4) or they are free speech. No other alternative exists." *Id.* at 45.

[86] *Seafarers International Union of North America, Atlantic & Gulf District, Harbor and Waterways Division v. N.L.R.B.*, 265 F.2d 585, 591 (D.C. Cir. 1959), as quoted in *Local 761, International Union of Electrical, Radio and Machine Workers, AFL-CIO v. N.L.R.B.*, 366 U.S. 667, 674 (1961). And *see International Longshoremen's Association (Allied International)*, *supra*, 257 NLRB No. 151, slip op. at 29-36 and cases cited therein.

the Board did so when it found that the ILA's political boycott of ships used in trade with Cuba violated Section 8(b)(4).[87]

And far from being "unwarranted," the inference that the ILA intended a cessation of business is almost superfluous in light of the ILA's statements and conduct which show that from the boycott's inception, the Union's leadership recognized that making goods bound to or from Russia "hot cargo" would affect hundreds of millions of dollars in shipments of such goods.[88] In the circumstances of this case, therefore, the court below was fully justified in finding that *an* object of the ILA boycott was forcing or requiring a cessation of domestic business vis-a-vis cargo bound to or from the Soviet Union, an object prohibited by the Act.

V. Conduct Forbidden By Section 8(b)(4) Is Not Protected By the First Amendment.

The court below correctly brushed aside "ILA's argument that its concerted conduct, carried out on orders of top union management, is protected by the First Amendment."[89] There is no guarantee under the First Amend-

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[87] *Local 1355, International Longshoremen's Association (Ocean Shipping Service, Ltd.)*, 146 NLRB 723, 727, (1964).

[88] *See*, pp. 3-4, *supra*. While the ILA, in its Brief to this Court, asserts that there is not a "jot of evidence" that the ILA intended to cause a cessation of business (Brief at 25), it admits that "[t]o the extent that the domestic impact could be said to have any purpose, it was a 'crucial part of the mechanism' by which the union's foreign objective was to be achieved." Brief at 13. In other words, while the union and its members could have protested the Afghan invasion *without* involving neutrals, the ILA, despite its claims to the contrary, made a "deliberate choice . . . to engage in activity beyond what was strictly necessary. . ." to register such a protest. *See* ILA cert. petition at 12, n. 10.

[89] 640 F.2d at 1379, citing *N.L.R.B. v. Retail Store Employees Union, Local 1001, supra*, 447 U.S. 607; *International Brotherhood of Electrical Workers v. NLRB*, 341 U.S. 694 (1951); *American Radio Association v. Mobile Steamship Association*, 419 U.S. 215, 229-31 (1974); *Teamsters Union v. Vogt, Inc.*, 354 U.S. 284 (1957).

ment or the NLRA that expression, whether speech or conduct, may never be abridged. The First Amendment does not "give absolute protection to every individual to speak whenever or wherever he pleases or to use any form of address in any circumstances that he chooses." [90] Furthermore, while the First Amendment's protections do "apply to certain non-verbal conduct of communicative nature, the communication of ideas by conduct is not guaranteed the same degree of protection accorded communication by pure speech." [91]

Rejecting the argument that the First Amendment protects "all modes of 'communication of ideas by conduct,'" this Court has held that:

> [G]overnmental regulation [of conduct] is sufficiently justified if it is within the constitutional power of government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.[92]

With particular regard to the secondary boycott provisions of the National Labor Relations Act, this Court long ago held in *International Brotherhood of Electrical Workers, Local 501 v. N.L.R.B.*[93] that "the prohibition of inducement of secondary pressure by § 8(b)(4)(A) carries no constitutional abridgement of free speech." [94] This

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[90] *Cohen v. California*, 403 U.S. 15, 20 (1971).

[91] *Joyce v. United States*, 454 F.2d 971, 987 (D.C. Cir. 1971), *cert. denied*, 405 U.S. 969 (1972).

[92] *United States v. O'Brien*, 391 U.S. 367, 376-77, *rehearing denied*, 393 U.S. 900 (1968). *See also, Younger v. Harris*, 401 U.S. 37, 52 (1971), and cases cited there; *A Quaker Action Group v. Morton*, 516 F.2d 717, 725-726 (D.C. Cir. 1975); *Bullock v. Mumford*, 509 F.2d 384, 387 (D.C. Cir. 1975); *U.S. v. Crosson*, 462 F.2d 96, 100 (9th Cir.), *cert. denied*, 409 U.S. 1064 (1972).

[93] 341 U.S. 694 (1951).

[94] *Id.* at 705. And note that the operative provisions of what was Section 8(b)(4)(A) when *I.B.E.W.* was decided now appear in Section 8(b)(4)(B), pursuant to the 1959 amendments.

principle has been reaffirmed consistently by the courts since *I.B.E.W.* was decided.[95]

The ILA's claim that the First Amendment protects its boycott[96] exemplifies what might be termed the "righteous brigand" theory of freedom of expression and action—that otherwise unlawful conduct motivated by "moral" considerations is insulated from legal sanctions by an unspecified amalgam of First Amendment "free speech" and "free exercise" principles. Thus, while the ILA asserts a right under the First Amendment "to engage in passive protest *as a means of expression*,"[97] the Union urges that part of the First Circuit's error resides in the court's "fail[ure] to distinguish between the right of expression, which is reflected in the publicity proviso of NLRA § 8(b)(4) itself, and the *right of conscientious refusal. . .*," *i.e.*, "the right of union members . . . to abstain from participating in what they deem an immoral endeavor" and the right of the Union to support such abstention.[98] The ILA emphasizes the pri-

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[95] *See, e.g., N.L.R.B. v. Local Union No. 3, International Brotherhood of Electrical Workers*, 477 F.2d 260, 266 (2d Cir.), *cert. denied*, 414 U.S. 1065 (1973); *National Maritime Union of America,\AFL-CIO v. N.L.R.B.*, 346 F.2d 411, 420 (D.C. Cir.), *cert. denied*, 382 U.S. 840, *rehearing denied*, 382 U.S. 933 (1965); *National Maritime Union of America, AFL-CIO v. N.L.R.B.*, 342 F.2d 598, 546 (2d Cir.), *cert. denied*, 382 U.S. 835, *rehearing denied*, 382 U.S. 933 (1965); *Brown ex rel. N.L.R.B. v. American Federation of Television and Radio Artists*, 191 F. Supp. 676 (N.D. Cal. 1961). And *see New Orleans Steamship Association v. General Longshore Workers ILA Local Union No. 1418*, 626 F.2d 445, 462-63 (5th Cir. 1980).

[96] *See* ILA cert. pet. at 12-14; ILA Brief at 33-43; and ILA Brief to the Fifth Circuit in *Baldovin v. International Longshoremen's Association, AFL-CIO* at 26-47, wherein the ILA contended that application of Section 8(b)(4) would abrogate union members' First Amendment rights by "compelling them to perform work repugnant to their political, moral, and religious beliefs."

[97] ILA cert. pet. at 12-13, emphasis supplied.

[98] *Id.* at 13-14, emphasis supplied.

Although the Union's "free exercise" defense was raised only implicitly in its petition for certiorari (cert. pet. at 13, n. 11), the ILA's Brief to this Court explicitly urges that the Court view

macy of this "right of conscientious refusal" by contending that "[s]ince this case does not involve any picketing, advertising or other publicity, the conscientious motive, rather than free expression, is paramount." [99]

Although the ILA has misread both the First Circuit's analysis [100] and the publicity proviso to Section 8(b)(4),[101] the Union is at least correct in its apparent recognition of the weakness of its claim that the boycott is a form of expression protected by the First Amendment.[102]

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the motivation of the ILA and its members in implementing this boycott as "occupy[ing] in the [lives] of its possessor[s] a place parallel to that fulfilled by . . . God. . . ." Brief at 33-34, *quoting United States v. Seeger*, 380 U.S. 163, 176 (1965).

[99] *Id.* at n. 13. Similarly, ILA maintains that "the union's action had as its object . . . governing only [ILA's] own conduct" and that the First Circuit's decision "deprived union members of any right in conscience to regulate their own behavior . . . ." *Id.* at 14.

[100] As is clear from its decision, 640 F.2d 1378-79, the First Circuit was addressing only the applicability of the primary strike or picketing proviso, and *not* the publicity proviso.

[101] Like the primary strike/picketing proviso, the publicity proviso is applicable only where there is a primary labor dispute with a primary employer. *See* Appendix A.

[102] In fact, *Schneider v. Irvington*, 308 U.S. 147 (1939), cited by the ILA in support of the proposition that "infringement of freedom of expression may not be justified on the grounds that alternative means of communication are open" [cert. pet. at 13, n. 12; Brief at 38, n. 53], is inapposite. In *Schneider*, the Court held that an ordinance which prohibited distribution of printed matter in streets and alleys but not in other public places nonetheless improperly abridged First Amendment freedom of expression, since "one is not to have the exercise of his liberty or expression in appropriate places abridged on the plea that it may be exercised in some other place." 308 U.S. at 163. The Court emphasized, however, that government may, "in the interest of the public safety, health, welfare, or convenience," properly limit the *conduct* of persons using streets or other public places without abridging the protected freedom of expression. *Id.* at 160-61. In the instant case, as the ILA concedes, "expression" is not the major issue, and, in any event, the court below did not suggest that the ILA should be prohibited from engaging in its boycott in Boston but not in some other place. On the contrary, emphasizing the strong

Prohibiting the ILA from ordering or encouraging its members to withhold their services from neutral employers would in no way abridge the freedom of the ILA or its members to express their views concerning the Russian invasion of Afghanistan. Secondary boycott conduct is unlawful, and the inducement of such conduct by oral or written statements is likewise unlawful. Application of Section 8(b)(4)(i) and (ii)(B) to the ILA's statements and conduct would not, therefore, constitute a content-based regulation of expression,[103] but rather a straightforward prohibition of illegal activity and the inducement or encouragement thereof.

The ILA's argument that its conduct is protected by the Free Exercise Clause must also fail. As this Court emphasized in *Gillette v. United States*,[104] "[o]ur cases do not at their farthest reach support the proposition that a stance of conscientious opposition relieves an objector from any colliding duty fixed by a democratic government."[105] The ILA's assertedly conscientious abstention from handling Soviet cargo collides head on with its obligation to refrain from engaging in secondary boycotts.

Moreover, even if a factual setting could be conceived wherein application of Section 8(b)(4) to a union's otherwise unlawful secondary boycott would impede unjustifiably some individuals' religious beliefs, that factual setting is not before this Court. First, "[o]nly beliefs rooted in religion are protected by the Free Exercise

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public policy objectives supporting Section 8(b)(4), 640 F.2d at 1377-78, the court stressed that prohibiting the union's "coercive tactics against neutral parties" would *not* "rob either the ILA or its members of their 'right of expression.'" *Id.* at 1378-79.

[103] *See N.L.R.B. v. Retail Store Employees Union, Local 1001*, 447 U.S. 607, 100 S.Ct. 2372, 2378-79 (1980), concurrences of Justices Blackman and Stevens; *Carey v. Brown*, —— U.S. ——, 100 S.Ct. 2286, 2295-96 (1980); *Police Department of Chicago v. Mosley*, 408 U.S. 92 (1972).

[104] 401 U.S. 437, *rehearing denied*, 402 U.S. 934 (1971).

[105] 401 U.S. at 461, and *see* cases cited there.

Clause. . . ." [106] Philosophical and personal beliefs of standards of conduct are not "religious" for purposes of the Religion Clauses.[107] Furthermore, to establish that a statute or other governmental act offends the Free Exercise Clause, "it is necessary . . . for one to show the coercive effect of the enactment as it operates against him in the practice of his religion." [108] Unless he can make such a showing, an individual has no standing to claim that a statute abrogates his Free Exercise Clause rights.

Here, although the ILA has alluded vaguely to the "religious" underpinnings of the boycott,[109] the credibility of such allusions is undercut by the Union's assertions elsewhere that "the [ILA's] action is, whatever its practicality, *solely political*," [110] and by the absence of any reference to religious considerations in ILA President Glea-

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[106] *Thomas v. Review Board of Indiana Employment Security Division*, —— U.S. ——, 101 S.Ct. 1425, 1430 (1981), citing *Sherbert v. Verner*, 374 U.S. 398 (1963), *Wisconsin v. Yoder*, 406 U.S. 205, 215-16 (1971).

[107] *Wisconsin v. Yoder*, 406 U.S. at 215-216.

ILA's citation (Brief at 33-34) of the conscientious objector cases [*Gillette v. United States*, 401 U.S. 437 (1970); *Welsh v. United States*, 398 U.S. 333 (1970); and *United States v. Seeger*, 380 U.S. 163 (1965)] is clearly inappropriate since those cases involved this Court's interpretation of a statutory exemption for religious objectors to participation in war, Section 6(j) of the Military Selective Service Act, 50 U.S.C. App. § 456(j). As stated in *Seeger*, this Court's construction of the terms "religious" and "Supreme Being" pertained "solely . . . to the language of Section 6(j) and not otherwise." 380 U.S. at 174. There is, of course, *no* "religious" or "conscientious" exemption to Section 8(b)(4)'s prohibition of secondary activity.

[108] *Abington Township School District v. Schempp*, 374 U.S. 203, 223 (1963), as quoted in *Board of Education of Central School District No. 1 v. Allen*, 392 U.S. 236, 248-49 (1968).

[109] *See* n. 98 above.

[110] ILA Brief to Fifth Circuit at 16, emphasis added. And *see id.* at 14 ("the ILA's activities . . . are grounded in a solely political protest designed to elicit a political, if any, reaction.")

son's statement ordering the boycott's commencement.[111] Similarly, no evidence has been introduced showing that *any* individual longshoreman or ILA officer has been or would be coerced in the exercise of his religion by the application of Section 8(b)(4). On the contrary, given the ILA's willingness to abandon its boycott when ordered to do so by an arbitrator or a court enforcing a labor contract's no-strike provision, or more significantly, when the Union's support for the policies of a new President and its sense of "fairness and evenhandedness towards all American business" [112] outweigh the demands of conscience,[113] the ILA's plea for Free Exercise Clause protection seems particularly specious.

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[111] *See* n. 5 above.

[112] *See* the news release issued on June 8, 1981 by the office of ILA President Thomas W. Gleason, Appendix C.

[113] *See* Brief at 34-35, and especially n. 46 wherein the ILA suggests that handling cargo bound to or from Russia might constitute treason.

CONCLUSION

Contrary to the expressed request of the then-President of the United States, the ILA has attempted to influence the foreign policy of another nation by engaging in an unlawful secondary boycott in this country. As ILA President Gleason predicted, the boycott had a tremendous impact upon neutral domestic employers in the chain of this Nation's commerce with the Soviet Union. The statute requires, and neither the First Amendment nor any decision of this Court precludes, the application of Section 8(b)(4)(i) and (ii)(B) to the ILA's conduct. Accordingly, the amicus curiae American Farm Bureau Federation respectfully urges that this Court affirm the holding of the court below and make it clear that there is no political protest exception to the statutory prohibition of secondary boycotts.

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APPENDICES

APPENDIX A

Section 8(b)(4)(i) and (ii)(B) makes it an unfair labor practice for a labor organization:

> to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is: . . . (B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9: *Provided*, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing; . . . *Provided further*, That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution.

APPENDIX B

Section 303 provides that:

(a) It shall be unlawful, for the purpose of this section only, in an industry or activity affecting commerce, for any labor organization to engage in any activity defined as an unfair labor practice in section 8(b)(4) of the National Labor Relations Act, as amended.

(b) whoever shall be injured in his business or property by reason of any violation of subsection (a) may sue therefor in any district court of the United States subject to the limitations and provisions of section 301 hereof without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit.

APPENDIX C

The text of the news release issued on June 3, 1981 by the office of ILA President Thomas W. Gleason is as follows:

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION URGES MEMBERS TO REMOVE BOYCOTT ON ALL OCEAN TRADE WITH SOVIET UNION

Thomas W. Gleason, President of the International Longshoremen's Association today announced that the 100,000 members of the union have been urged by the leadership to handle all ocean trade between the United States and the Soviet Union in normal manner effective immediately.

He noted that ILA on April 24, 1981 recommended that the membership resume handling grains, phosphate rock and fertilizer material bound for the Soviet Union in keeping with a trade policy decision of the Reagan administration. This marked the first voluntary break in the union boycott against Russian cargoes that was imposed on January 9, 1980.

Mr. Gleason said the union leadership now feels that ILA longshoremen should handle all commodities in ocean commerce between the two countries with no restrictions as a matter of equity to all parties.

He said that producers, manufacturers and importers of products which were never embargoed by United States government policy should be given handling treatment by ILA similar to that for grains, phosphate rock and fertilizer material.

"In the interests of fairness and evenhandedness towards all American business and in further support of President Reagan's present trade policy, the

ILA recommends to its members that they now discontinue their refusal to handle goods bound to and from the Soviet Union," Mr. Gleason said.

The ILA is the nation's largest waterfront union and it represents dockworkers in ports from Maine to Texas as well as the Great Lakes, Puerto Rico, and Canada.